Supreme Court, U.S.
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No. 97-1481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LIBERTY NATIONAL LIFE INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

SAMUEL L. DAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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58 pp

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding because it does not list the Plaintiff/Respondent, Samuel L. Day. With that addition, the petition accurately lists the parties to this proceeding.

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STATEMENT OF THE CASE

A. The Question Presented, as listed by Petitioner, is inaccurate and misleading.

In its Question Presented, Petitioner, Liberty National Life Insurance Company (hereinafter "Liberty National"), asks this Court to assume that it had a valid affirmative defense; however, there is no record evidence to support this. Indeed, one of the problems with Liberty National's having first attempted to raise the statute of limitations affirmative defense after the jury had already returned its verdict in favor of respondent, Samuel L. Day (hereinafter "Day"), was that he had no opportunity to present evidence on the issues of equitable estoppel and equitable tolling of the statute of limitations.

The question presented offered by Liberty National also fails to alert this Court that Liberty National failed to articulate its affirmative defense at any time through the various stages of the case and indeed did not even object to the jury verdict form which stated that Day would receive damages if he proved an intentional but non-willful violation of the Age Discrimination in Employment Act (hereinafter "ADEA").

Because of these shortcomings, Day proposes the following question presented:

whether the circuit court properly recognized that the trial court abused its discretion when it permitted Liberty National to raise a statute of limitations affirmative defense where Liberty National failed to raise that defense in its pleadings, failed to ever amend its pleadings, failed to raise it in a joint pre-trial stipulation which was incorporated into a pre-trial order, failed to raise it in its trial brief, failed to request a jury instruction on the statute of limitations, failed to object to the jury's special verdict form, and raised that affirmative defense for the first time after the jury had returned a verdict in Day's favor, surprising both the court and Day in the process.

B. In its Statement of the Case, the Petitioner has selectively ignored numerous salient facts.

In relating its Statement of the Case, Liberty National has selectively related the facts and in doing so has ignored many probative facts. Rather than reiterating an entire Statement of Facts here, Day adds the following additional facts as being especially probative.

When Day filed his lawsuit in the United States District Court for the Northern District of Florida on April 29, 1994, alleging intentional and willful violations of the ADEA, he did so *pro se*. When answering this

complaint, Liberty National did raise affirmative defenses; however, it chose not to raise a statute of limitations defense. Appendix A at 2a.

As the case neared trial, the parties entered into a joint pre-trial stipulation on October 18, 1995. The district court then incorporated these stipulations into its pre-trial order on October 26, 1995 and asked Liberty National to submit a trial brief. Liberty National filed its trial brief on November 2, 1995. Nowhere in the pre-trial stipulation, the pre-trial order, or Liberty National's trial brief is there any mention of a statute of limitations defense. Indeed, any fair reading of those documents leads to the conclusion that the statute of limitations was not an issue in the case.

Specifically, the agreed upon issues of law which were stated in the pre-trial stipulation, and which were incorporated into the pre-trial order, stated:

> 1. This court has jurisdiction over the parties and the subject matter of this dispute.
>
> 2. Plaintiff has fulfilled all of the conditions precedent to the institution of this action.
>
> 3. If plaintiff prevails, his remedies may include back pay, reinstatement or front pay, the value of perks, benefits, including increased retirement benefits, interest --

> including pre-judgment interest, attorneys' fees and costs.
>
> 4. If plaintiff proves that defendant willfully violated the Age Discrimination in Employment Act, he shall be entitled to liquidated damages. Top rove [sic] a willful violation of the Act, plaintiff must demonstrate that defendant knew or should have known that the Age Discrimination in Employment Act prohibited the actions alleged to have been taken against the plaintiff by the defendant, yet undertook such actions in reckless disregard of plaintiff's rights.

Appendix B at 16a. These issues of law were then incorporated into the district court's pre-trial order.

Similarly, in its trial brief, Liberty National set out the law it deemed applicable to the case. In doing so, Liberty National never mentioned any statutes of limitation. Specifically, its trial brief stated:

> 16. Should Defendant be found to have violated the ADEA in discharging Plaintiff, Plaintiff's recovery must be limited to lost wages and benefits. See, Maleszewski v. United States, 827 F.Supp. 1553, 1556 (N.D. Fla. 1993). Moreover, any award of equitable relief (e.g. front page [sic]) should be determined by the Court rather

than the jury.

> 17. Plaintiff's entitlement to liquidated damages is dependent upon proof that Defendant willfully violated the ADEA in discharging Plaintiff. Such a willful violation may be found only where it is determined that Defendant discharged Plaintiff when it "knew or showed reckless disregard for the matter of whether its conduct was published [sic] by the ADEA". Castle v. Sangamo Weston, Inc., 837 F.2d 550 (11th Cir. 1988).

Appendix C at 22a.

Clearly, Liberty National never alerted Day or the court that it was raising a statute of limitations defense in either its answer, the joint pre-trial stipulation which was incorporated into a pre-trial order, or its trial brief. Moreover, after the first trial ended in a mistrial because of jury deadlock, Liberty National never moved to amend the pleadings or the joint pre-trial stipulation to raise an affirmative defense. Indeed, it did nothing to alert anyone that it was intending to rely upon such a defense.

During the second trial, Liberty National did not argue or pursue any limitations defense at the close of Day's case or at the close of the evidence. Moreover, Liberty National did not put on any evidence that the complaint had been filed in excess of two years from

plaintiff's termination. Furthermore, at the jury charge conference held at the conclusion of all the evidence, Liberty National did not request a jury instruction regarding any affirmative defenses. Additionally, it did not object to the jury instructions and/or the special jury verdict form which were ultimately given by the trial court. The special jury verdict form read as follows:

> 1. Do you find, by a preponderance of the evidence, that age was a determining factor in the defendant's decision to terminate plaintiff?
>
> Answer "Yes" or "No".
>
> YES: _____ NO: _____
>
> (If you have answered "Yes", then answer Question No. 2. If you have answered "No", then do not answer any of the other questions, and have your Foreman sign and date this form.)
>
> 2. What amount of back pay and compensatory damages do you find that the plaintiff is entitled to receive?
>
> Amount: $_____
>
> 3. In terminating the plaintiff, do you find that the defendant "willfully" violated the Age Discrimination in Employment

> Act, as the term "willful" was defined for you in the Court's instructions?
>
> Answer "Yes" or "No".
>
> YES: _____ NO: ____
>
> (If you answer "Yes", the Court will double the amount of damages you found in Question No. 2).

Appendix D at 24a - 25a. Clearly, this special verdict form contemplated that Day would receive compensatory damages if the jury found that Liberty National committed an intentional, but not willful, violation of the ADEA.

Despite the above, Liberty National first mentioned a statute of limitations defense after the jury had returned a verdict in Day's favor in the amount of $300,000. The record reveals that neither the court nor the plaintiff were aware the defendant was asserting this defense prior to that time. Liberty National's unveiling of the statute of limitations defense occurred as follows:

> THE COURT: * * * Subject to that, anything else to come before the Court from either side?
>
> MR. KELLY [Counsel for Plaintiff]: Nothing for the plaintiff, Your Honor.

MR. ASHBURN [Counsel for Defendant]: Yes, Your Honor. It's a legal matter that I don't know if we need to take up in front of you or not, based on the verdict that was rendered, Your Honor, based on the answer to Question 3, and the timing of the bringing of this action.

THE COURT: I'm not sure I understand what you mean.

MR. ASHBURN: Your Honor, as a matter of law, this action was not brought within two years; and, therefore, under the statute, for the defendant (sic) to recover any amount of monies, he had to prove that the discrimination was willful. The jury has rendered a verdict that the discrimination was not willful.

THE COURT: We'll take that up, then. I'm not sure that I understand your ramifications of what you are telling me, but we'll take that up in just a moment. I'll let the jury go home.

* * *

(Whereupon the jury was excused and a recess was taken)

THE COURT: Take seats. We have the parties and lawyers here. Mr. Ashburn, tell me what the problem is.

MR. ASHBURN: Yes, Your Honor. Under the statute that the plaintiff has brought his claim, it provides that, if he had filed his action within a certain two-year time frame, then he would be entitled to recover on the findings as we find them in the first two questions. It also provides, however, that, if the claim was not brought within those two years, but it was brought within a three-year period, which this one made it in within a matter of days -- it was made within the three-year period -- that he can only recover if there's a finding that the discrimination is willful.

The jury specifically found on their third item that this was not a willful discrimination; therefore, under that statute, we don't believe he can recover anything.

THE COURT: All right. Mr. Kelly?

MR. KELLY: I don't think that is accurate; but, at this stage, I'm not prepared to argue to the Court.

> THE COURT: All right. Well, I'm going to let you both submit a memorandum on it, and you can do it simultaneously. I'll give you -- let's do it quickly. I'll give you a week from today. So, that ought to be enough time. It ought to be a pretty simply issue, whatever it is. I haven't even realized, I guess, that there was a distinction between the two-year and three-year statute of limitation.
>
> MR. KELLY: There is in terms of damages, Your Honor, that I'm aware of, but not in terms of filing. But, at any rate, we'll find out.
>
> THE COURT: Well, brief it for me, and then I'll make a decision on the matter; and we'll see what else, if anything, we might do.

Appendix E at 26a - 28a (emphasis added).

This is the context in which Liberty National first raised its statute of limitations affirmative defense; after it had failed to raise that defense in its answer, after it had failed to amend its pleadings, after it had failed to raise the defense in the joint pre-trial stipulation, after it had failed to raise the defense in its trial brief, after it had failed to request a jury instruction on that defense or present evidence on it, after it had failed to object to the special verdict form, and after the jury had returned a

verdict against it. Indeed, in doing so Liberty National surprised both the Court and Day. The Eleventh Circuit Court of Appeal concluded that this was too late.

REASONS FOR DENYING THE WRIT

It is beyond dispute that this Court is able to review but a limited number of cases each year. There is no reason for this Court to expend its precious time and resources on this matter. Because Congress has abolished the two-tiered statute of limitations scheme under the ADEA which gives rise to the issues in this case, because this Court previously denied a writ for certiorari in a nearly identical case, because every circuit court which has addressed the issues Liberty National attempts to raise has rendered a holding identical to the one in the instant case, and because the decision of the Eleventh Circuit Court of Appeals was clearly correct, this Court should not expend its limited time and resources on this cause, and it should deny Liberty National's petition for writ of certiorari.

I. The issue presented in this case is nearly incapable of surfacing again.

As this Court is surely aware, prior to the passage of the Civil Rights Act of 1991 the ADEA incorporated the statute of limitations provision contained in the Portal-to-Portal Pay Act of 1947, which is codified at 29 U.S.C. §255. Under this statutory scheme, an ADEA plaintiff had three years in which to file suit alleging a willful violation of the statute but only had two years in

which to allege intentional age discrimination. It is this two-tiered statute of limitations that has caused confusion in the instant case and gives rise to the issues Liberty National now attempts to raise in this Court.

In 1991, however, Congress eliminated this two-tiered statute of limitations scheme, opting instead to allow a plaintiff to file his suit at any time within ninety days of the EEOC's making a determination in his case or issuing him a notice of right to sue. See 29 U.S.C. §626(e). Because of this revision of the ADEA's statute of limitations, it would be virtually impossible for the question presented in Day's case to arise again. Indeed, Day was probably one of the last plaintiffs to have filed suit alleging age discrimination under this two-tiered statute. At any rate, because this Court has limited time and resources, and must necessarily devote its valuable time to the most important legal issues confronting this nation, such limited time and resources would not be wisely expended on an issue which is unlikely to surface again in the context of age discrimination because of Congress' overhauling the ADEA's statute of limitations structure. Consequently, Liberty National's petition for a writ of certiorari should be denied.

II. This Court has already denied certiorari in a nearly identical case.

In 1984 this Court was presented with the opportunity to review a nearly identical case involving the ADEA's two-tiered statute of limitations structure: Heiar v. Crawford County, Wisconsin, 746 F.2d 1190

(7th Cir. 1984). This Court denied the petitioner's invitation to do so. 472 U.S. 1027. For nearly a dozen years thereafter, this issue did not resurface in any case which counsel for either Liberty National or Day has found. Once it finally resurfaced in the instant case, the Eleventh Circuit Court of Appeals rendered a decision which was in complete harmony with the Seventh Circuit Court of Appeals' decision in Heiar. With both courts having reached the same conclusion, there is no reason to believe that other courts will have difficulty addressing this situation, should it ever recur. Consequently, Liberty National's petition for a writ of certiorari should be denied.

III. There is no conflict among the circuits on this issue.

Every circuit court which has addressed the topic of raising an affirmative defense under the ADEA's two-tiered statute of limitations has held that a defendant cannot wait until after a jury has returned its verdict in order to raise that affirmative defense.

As previously related, in Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985), the court addressed a nearly identical situation to that of the case *sub judice*. Like Liberty National, the defendant in Heiar was defending a case brought under the ADEA while it still embraced the two-tiered statute of limitations. Unlike Liberty National, the defendant in Heiar expressly raised the statute of limitations defense in its answer, as

required by Rule 8(c), Fed.R.Civ.P., but failed to mention it again until the case was concluded. Holding that the statute of limitations defense had been abandoned by the defendant, the court found Rule 16(e), Fed.R.Civ.P., dispositive. Id. at 1196.

Rule 16(e) provides that pretrial orders:

> shall control the subsequent course of action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Considering this language, the Heiar court noted that a pretrial order had been entered in the case and that it made no mention of the two-year statute of limitations. 746 F.2d at 1196. Because this order controlled the subsequent action of the case, the court held that the statute of limitations defense had been abandoned. Id. at 1196-97.

In reaching this conclusion, the court in Heiar implicitly recognized that the defendant's failure to mention the statute of limitations defense in the pretrial order had effectively lulled the plaintiffs to sleep, for if they had known that the statute of limitations was in play they might have presented evidence in the district court to show that the statute should be tolled. See id. at 1197. Thus, the defendant was not permitted to wait until this opportunity had passed the plaintiffs by before attempting to resurrect the defense. See id. This same

rationale was found controlling in the case *sub judice*.

The cases of Day and Heiar are the only two which counsel for Day could find that considered the two-tiered statute of limitations scheme which was formerly employed under the ADEA. Nevertheless, analogous cases from other circuits are also in accord with the circuit courts' decisions in Heiar and Day.

In Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979), for instance, the court considered a similar situation and held that an employer who failed to raise a statute of limitations affirmative defense in its pleadings and which failed to object to the court's jury instructions would not be permitted to raise that affirmative defense in a motion for judgment notwithstanding the verdict -- finding that such conduct resulted in the waiver of the statute of limitations affirmative defense. 590 F.2d at 134 (citing 5 C. Wright & Miller, Federal Practice and Procedure, §1278 (1969), and Dunn v. Koehring Co., 546 F.2d 1193, 1199 (5th Cir. 1977)).

A similar decision was also reached by the Sixth Circuit Court of Appeals in Scot Lad Foods, Inc. v. Ayar, 113 F.3d 1235, 1997 WL 199493 (6th Cir. April 22, 1997). In Ayar, the Sixth Circuit similarly held that affirmative defenses not raised in the pre-trial order could not be raised during trial. That is exactly what happened in the instant case, except here Liberty National attempted to raise its affirmative defense even later -- after the jury had returned its verdict.

The above-referenced cases demonstrate that the circuit courts which have addressed similar situations have held with unanimity that defendants who do not raise an affirmative defense until they are awoken by the sound of a substantial verdict against them will be deemed to have waived their affirmative defenses.[1] All of the circuit courts are in accord on this issue, and indeed any other decision would render Rules 8(c), 16(e), and 51, Fed.R.Civ.P., meaningless. Furthermore, any other decision would encourage defendants to remain silent and never alert anyone that any affirmative defenses were in play.

In an effort to find conflict among the circuits where none exists, Liberty National argues that in Day the Eleventh Circuit articulated a *per se* rule that an unpled affirmative defense is waived. (Petition for Certiorari at 13). This position is intellectually dishonest, for the Eleventh Circuit has never embraced this view.

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[1]After all, it has been noted that "defendants deemed to have waived [affirmative defenses] generally raise[] the issue for the first time quite late in the proceedings -- after a trial has been lost or on appeal." North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 432 (11th Cir. 1993)(citing Aluminum Prods. Distribs., Inc. v. Aaacon Auto Transp., Inc., 549 F.2d 1381, 1384 (10th Cir. 1977), and Louisville & Nashville R.R. Co. v. M-V Bayou Lacombe, 597 F.2d 469, 471 n.1 (5th Cir. 1979)).

Indeed, the Eleventh Circuit has long recognized that an answer can be amended to include an affirmative defense as long as all parties are on notice that the defense will be asserted and there is no clear evidence of waiver. E.g., North Georgia Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 431-32 (11th Cir. 1993). Liberty National's wishful thinking notwithstanding, the Eleventh Circuit did not modify this position in Day.

Instead, what the Eleventh Circuit did in the case *sub judice* was recognize that a district court abuses its discretion when it permits a party to raise an affirmative defense where that party failed to raise that defense in its pleadings (but raised other affirmative defenses), failed to amend its pleadings to include that affirmative defense, failed to raise the defense in a joint pre-trial stipulation which was incorporated into a pre-trial order, failed to raise it in its trial brief, failed to request a jury instruction on the affirmative defense, failed to object to the jury's special verdict form, and raised that affirmative defense for the first time after the jury had returned a verdict in favor of the other party. Additionally, it is important to note that even the district court had no idea that the statute of limitations defense was in play.

Given these facts, the Eleventh Circuit's opinion in Day is a far cry from the *per se* approach that Liberty National now argues -- that failure to plead an affirmative defense in an answer constitutes an absolute waiver. Quite simply, the facts of the case do not support this allegation.

In addition to alleging that the Eleventh Circuit has adopted a *per se* approach to affirmative defenses, Liberty National makes a similar baseless assertion concerning the D.C. Circuit's decision in Harris v. Secretary, U.S. Dept. of Veterans Affairs, 126 F.3d 339 (D.C. Cir. 1997). (Petition for Certiorari at 13). Clearly, a closer reading of Harris shows that a *per se* approach was not adopted in that case. To the contrary, the D.C. Circuit merely explained that an affirmative defense should not be raised in a motion; instead, the pleadings should be amended to include that defense. Thereafter, the defense can be raised and argued. 126 F.3d at 339. Clearly, that is a not a *per se* approach. Moreover, it is odd that Liberty National is attempting to rely on Harris even though it never moved to amend its pleadings to include the affirmative defense it now attempts to resurrect.

IV. The Eleventh Circuit Court of Appeals made the proper decision in the case *sub judice*.

The Federal Rules of Civil Procedure provide a level playing field upon which all litigants must prosecute and defend their claims. In the instant case, Liberty National clearly did not adhere to those rules. As a result, the Eleventh Circuit Court of Appeals properly recognized that Liberty National could not raise an affirmative defense after the jury had already returned its verdict, where Liberty National had not even previously intimated that it was relying upon such a defense previously.

Rule 8(c), Fed.R.Civ.P., requires that a responsive pleading set forth certain enumerated affirmative defenses. One of these defenses is the statute of limitations. Rule 8(c) clearly provides that this affirmative defense must be specifically pled and enumerated. It is undisputed that Liberty National never did this. Furthermore, Liberty National never moved to amend its pleadings to include this affirmative defense -- despite the fact that it had raised other affirmative defenses.

In the instant case, the parties entered into a joint pre-trial stipulation which was later incorporated into the district court's pre-trial order. Rule 16(e) provides that pre-trial orders "shall control the subsequent course of action" in the case unless they are modified. And this modification may occur only to prevent "manifest injustice." Rule 16(e), Fed.R.Civ.P. In the instant case, Liberty National did not raise its statute of limitations affirmative defense; therefore, it waived that defense. See, e.g., EEOC v. White & Son Enters., 881 F.2d 1006, 1009 (11th Cir. 1989)(statute of limitations must be expressly pleaded and included in pre-trial order or it is waived). Indeed, any other conclusion would render pre-trial stipulations and pre-trial orders meaningless.

In relevant part, Rule 51, Fed.R.Civ.P., states that no one "may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict." In the instant case, the instructions and the special verdict form both contemplated that a finding of intentional

discrimination would result in an award of make-whole relief, while a finding of willful discrimination would merely increase the award in the form of liquidated damages. Thus, according to the provisions of Rule 51, Liberty National's failure to object to the jury instructions and the special verdict form renders it unable to later argue that those instructions and/or the form are incorrect.

In the instant case, Liberty National failed to comply with Rules 8(c), 16(e), and 51, and in doing so secreted a defense only to raise it after the jury had returned a verdict, surprising the court and Day in the process. Such conscious and deliberate non-compliance with the Federal Rules of Civil Procedure were not condoned by the Eleventh Circuit Court of Appeals and should not be condoned by this Court.

Moreover, the prior decision of this Court in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1970), is in accord. As this Court is well aware, in that case the defendant attempted to raise affirmative defenses which it had not previously raised and was attempting to do so a year after the evidence was closed. Id. at 323. In that instance, the trial court refused to permit the defendant to do this, and this Court affirmed the trial court. In doing so, it recognized that allowing a party to amend its pleadings and raise new affirmative defenses after the close of the evidence would have substantially prejudiced the other party. Id. at 331. It also noted that permitting the defendant to raise new affirmative defenses would have had the effect of denying

a plaintiff the opportunity to prove its case -- which would definitely not conform with the letter or the spirit of the Federal Rules of Civil Procedure. Id. Indeed, this Court further recognized that if a party were entitled to amend its pleadings after the close of the evidence, then the record would have to reopened to hear other evidence. Id.

Applying those facts to the case *sub judice*, it is obvious that the trial court did not adhere to this Court's teachings in Zenith. In the instant case, the district court judge dismissed Day's jury, entered judgment in Day's favor, and then later permitted Liberty National to raise an affirmative defense even though it never moved to amend its pleadings under Rule 15(a), Fed.R.Civ.P. Moreover, Day was never afforded the opportunity to offer any evidence on this issue or present evidence of equitable tolling or modification, even though this Court suggested this was required under Zenith. Nevertheless, the district court, hearing no evidence, set aside Day's judgment. This was clearly an abuse of discretion, and the Eleventh Circuit Court of Appeals properly recognized this. Because this reversal of the district court was proper, Liberty National's petition for writ of certiorari should be denied.

CONCLUSION

Because Congress has abolished the two-tiered statute of limitations scheme under the ADEA which gives rise to the issues in this case, because this Court previously denied a petition for writ for certiorari in a

nearly identical case, because every circuit court which has addressed the issues Liberty National attempts to raise has rendered a holding identical to the one in the instant case, and because the decision of the Eleventh Circuit Court of Appeals was clearly correct, this Court should not expend its limited time and resources on this cause, and it should deny Liberty National's petition for a writ of certiorari.

Dated: April 9, 1998

Respectfully submitted,

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Counsel for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MCA 94-50124/RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Liberty National Life Insurance Company hereby submits its answers and affirmative defenses to Plaintiff, Samuel L. Day's Complaint.

1. Denied.

2. Denied.

3. Admitted.

4. Admit that Defendant employees at least 20 persons but deny that Defendant is subject to suit under the Age Discrimination Employment Act, 29 U.S.C., §621 et seq. in this action.

5. See paragraphs 1 through 4 above.

6. Denied.

7. Denied.

8. Admitted.

9. Admit that Plaintiff won numerous sales awards during his employment with Defendant, but deny that Plaintiff's sales record was "excellent".

10. Denied.

11. Admit that Defendant was required to pay claims on policies issued through Plaintiff, but deny the remainder of the paragraph.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

AFFIRMATIVE DEFENSES

16. Plaintiff's claims are barred by his failure to comply with the requirements of 29UCS, §626(d).

17. Plaintiff's claims are barred by the doctrines of waiver and/or estoppel and/or laches.

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

/s/ David C. Ashburn
DAVID C. ASHBURN
Fla. Bar No. 708046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Samuel L. Day, 1120 Tennessee Avenue, Lynn Haven, Florida 32444 this 10th day of August, 1994.

David C. Ashburn
DAVID C. ASHBURN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case No. 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

JOINT PRETRIAL STIPULATION

Counsel for the parties have met, via telephone, due to conflicting schedules. They submit the following joint pretrial stipulation pursuant to this court's order entered on July 17, 1995.

(A) *Jurisdiction.* The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§1331, 1343(4) and the Age Discrimination in Employment Act, 29 U.S.C. §621, *et. seq.*

(B) *Nature of the action.* The nature of this claim is age discrimination.

(C) *Brief statement of each party's case.*

Plaintiff's case. Plaintiff seeks compensatory and liquidated damages, attorneys' fees, interest, including

prejudgment interest, and costs as a result of the discrimination he experienced in connection with various decisions of defendant which affected the terms and conditions of his employment and, ultimately, resulted in his termination.

Defendant's case. Defendant contends that it terminated plaintiff's employment based upon plaintiff's unsatisfactory job performance. Defendant contends that plaintiff's job performance was unsatisfactory because, among other things, plaintiff violated defendant's policies and procedures and sold insurance policies contrary to defendant's underwriting guidelines. Defendant contends that because of plaintiff's unsatisfactory performance, defendant was required to pay an excessive number and amount of insurance claims.

(D) *Exhibits to be offered at trial.*

Plaintiff intends to offer the following exhibits:

1. Agent's contract–Sammy L. Day, Jr.
2. Sales manager weekly requirements
3. Miscellaneous two-page chart regarding Jones Group
4. Letter from Don Horton undated and 11/27-/90 regarding service work
5. Friday sales planning
6. Letter to all DLH district managers dated May 8, 1991
7. Article, "Canvassing is Key" by S. L. Day, Jr.
8. Letter from Bill Jones dated 9/22/92
9. Memos to Torch Club qualifiers, April 1, 1991, and January 25, 1991

10. Extract from policy manual regarding qualifiers not in attendance
11. 1991 Torch Club brochure
12. Various personnel transaction memos for Sammy Day
13. Honor agent by region listing
14. Memo to the district manager dated 4/9/91
15. Letter to Don Pitts dated 4/25/91
16. Handwritten note of requirements dated 4/-18/91
17. Various documents regarding Panama City All Stars with attachments
18. Handwritten note to Day from Horton with attachment
19. Note to Day from Brown
20. Miscellaneous listings of honors, letters of commendation, etc.
21. Printouts of health claims processed
22. The Beacon, May, 1992; April, 1991; June, 1991; March, 1991
23. EEOC charge of discrimination for Sammy Day
24. EEOC determination for Sammy Day
25. Personal achievement file for Sammy Day
26. Note dated 5/20/91 to Shirley regarding Sammy Day's termination
27. Notice of termination of personnel (Sammy Day)
28. Various earnings statements for Sammy Day

29. Summary of claims experience–life
30. Agency management bulletins for Panama City
31. Agency management report of MC policies
32. Payroll deduction persistency reports
33. District summary of net credits for 0073
34. 1988-1990 summary of claims experience–A & H Report
35. Previous four quarters production report
36. Listing of top 100 agents in the company
37. Letter dated April 4, 1991
38. Chart of base growth
39. Various weekly bulletins for Panama City
40. Sales manager premium increase report for 4/25/91

Defendant intends to offer the following exhibits:

1. Liberty National final report of personnel termination
2. Liberty National notice of termination of personnel signed by Don Pitts
3. Liberty National notice of termination of personnel signed by Don Horton
4. 5/20/91 memorandum re Samuel L. Day, Jr.
5. Samuel Lofton Day, Jr. agent's contract dated 4/1/85
6. Samuel Lofton Day, Jr. agent's contract dated 3/23/70

7. Application for life insurance policy; proposed insured: Walter C. Sherman
8. Sherman insurance policy
9. Letter from S. L. Day dated 6/25/91
10. Liberty National agents' job description
11. Liberty National "Guide to Growth for Agents"
12. Liberty National table of personnel changes for District 73
13. Liberty National list of employees of Panama City District 1989 to present
14. Chart depicting claims/loss ratio for Sammy Day
15. Personnel transaction memorandum dated 3/29/91
16. Personnel transaction memorandum dated 1/-11/91
17. Medical records for Enoch Toole
18. Liberty National policy/claim file for Toole
19. Transcript of final hearing; *Day v. Liberty National Life Insurance Company*, Case No. 92-3779; October 13, 1992
20. Transcript of deposition of Sammy Day, October 6, 1992
21. State of Florida, Commission on Human Relations Final Order Dismissing Petition for Relief from an Unlawful Employment Practice, Case No. 91-8507
22. State of Florida, Division of Administrative Hearings, Recommended Order, Case No. 92-3779

23. US Equal Employment Opportunity Commission Determination

24. Administrative complaint filed by Florida Department of Insurance file re D.O.I. Case No. 94-L-345DTG

25. Transcript of final hearing in Florida Department of Insurance Case No. 94-L-345DTG (Division of Administrative Hearings Case No. 94-4317) (not yet prepared by court reporter; will be provided when available)

26. Affidavit of John Brooks re proposed insured David Daugherty

27. Application for life insurance re proposed insured David Daugherty; premium refund request; Liberty National memorandum re same

28. Letter from James Poole, Esq. to Samuel L. Day dated 6/13/91

29. Letter from Walter R. Shellnutt to Samuel L. Day dated 9/27/91 re final settlement of account

30. Notice of Charge of Discrimination from Equal Employment Opportunity Commission

31. Letters from Carol Atkinson to Doug Harris dated October 7, 1991

32. Florida Department of Insurance notification of complaint received from Sibyl Gordey

33. Letter from Ann Jandl to Robert H. Neile dated 4/15/93 re Sibyl Gordey

34. Florida Department of Insurance consumer assistance request by Sibyl Gordey

35. Letter from Inez McCall re Pol. No. 31250757

36. Computer report re Liberty National 1988-90 summary of claims experience—A & H
37. Computer report re Liberty National 1988-90 summary of claims experience—life
38. Documents produced by Day in discovery (will produce at plaintiff's request)
39. "Memorandum Brief in Support of Petitioner's Exceptions to Recommended Order" prepared and filed by Day in Division of Administrative Hearings Case No. 92-3779
40. "Proposed Recommended Order" prepared and filed by Day in Division of Administrative Hearings Case No. 92-3779
41. Charge of Discrimination filed by Day dated 10-/8/91
42. Petition for Relief filed by Day with Florida Commission on Human Relations
43. Florida Commission on Human Relations "Determination: No Cause"
44. Responses to discovery requests filed by Day in this case (will produce at plaintiff's request)
45. Documents proposed as exhibits by plaintiff
46. Agents employed in District 73 since 2/14/95
47. Documents depicting claims/loss ratios for Day
48. Agent's Instruction Guide, 1988-90
49. Field Procedures Manual

Note: The parties reserve the right to add additional exhibits to this list, including documents subsequently discovered, documents obtained pursuant to requests for production, pleadings, answers to interrogatories, and any exhibits which may be listed by the other party.

Objections: Because of the conflicting schedules of the parties' attorneys, they are requesting an extension of time within which to file objections to exhibits and the grounds therefor. In any event, such objections will be presented to the court in sufficient time prior to trial so as to enable to the court to make rulings on the exhibits in an efficient fashion.

(E) *Names and addresses of witnesses.*

Plaintiff's witnesses:

1. Enoch Toole
   P.O. Box 129
   Youngstown, FL 32466
2. William Jones
   904 Jeremy Lane
   Panama City, FL 32401
3. Linda Suggs
   1210 Illinois Avenue
   Lynn Haven, FL 32444
4. Fred Seyforth
   7 25th Street
   P.O. Box 216
   Apalachicola, FL 32320
5. Dennis Fuller
   503 Amy Street
   Lynn Haven, FL 32444
6. Robert Fuller
   3614 East Game Farm Road
   Panama City, FL 32401
7. Lorene Turner
   314 Liddon Place
   Lynn Haven, FL 32444

8. Barbara Thomas
   P.O. Box 484
   Southport, FL 32409

9. Ouida Burleson
   9734 Maple Ave.
   Youngstown, FL 32466

10. Ethelene Landrum
    1215 Carolina Avenue
    Lynn Haven, FL 32444

11. Joe Gainer
    1817 Georgia Court
    Lynn Haven, FL 32444

12. Judge Sorrells
    1328 Braircliff Road
    Dothan, AL 36303

13. Eddie Vaughn
    2917 Laurie Ave.
    Panama City Beach, FL 32407

14. Gary Morgan
    2817 Longleaf Road
    Panama City, FL 32405

15. Harry Sanders
    811 W. Pierson Dr.
    Lynn Haven, FL 32444

16. James Torrance
    211 Via de Luna Drive
    Pensacola Beach, FL 32561

17. Samuel L. Day
    P.O. Box 1444
    Lynn Haven, FL 32444

18. Barbara Day
P.O. Box 1444
Lynn Haven, FL 32444

Defendant's witnesses:

1. Don Horton
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
2. Stan LaRussa
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
3. Doug Harris
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
4. Mike Bryant
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
5. Tom Hamby
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
6. Jack Brown
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202
7. John Livingston
Liberty National Life Ins. Co.
2001 3rd Avenue South
Birmingham, AL 35202

8. Bob Neill
   Liberty National Life Ins. Co.
   2001 3rd Avenue South
   Birmingham, AL 35202
9. Judge C. Stanaland
   Route 2, Box 710
   Crestview, FL 32936
10. Bill Newman
    1900 Liberty Lane
    Panama City, FL 32405
11. Bob Neiberger
    104 Kennesaw Lane
    Panama City, FL 32404
12. John Brooks
    1900 Liberty Lane
    Panama City, FL 32405
13. Inez McCall
    9523 Indian Bluff Resort Lane
    Youngstown, FL 32466
14. Joyce Wedge
    7213 Hiawatha St.
    Panama City, FL 32404
15. Andrea Brown
16. Don Pitts
17. Beverly Brewster
    612 Larson Building
    Tallahassee, FL 32399-0333
18. Donna Edgar
    315-B S. Palafox St.
    Pensacola, FL 32501
19. Carol Atkinson

20. Ed Scisson
612 Larson Building
Tallahassee, FL 32399-0333

21. David Daugherty
325 E. Sixth Street
Panama City, FL 32401

22. Dr. David A. Crown (expert)
3344 Twin Lakes Lane
Sanibel Island, FL 33957

23. Sibyl Gordey
706 Minnesota Avenue
Lynn Haven, FL 32444

Note: The parties reserve the right to seek permission to add witnesses to these lists in the event circumstances require it. Moreover, they reserve the right to call any witnesses listed by one another.

(F) *Admitted facts.*

1. Plaintiff is a citizen of the United States and a resident of Panama City, Florida.

2. Plaintiff was born on January 22, 1939.

3. Plaintiff was employed by defendant, Liberty National Life Insurance Company, from March 23, 1970, until his termination on May 8, 1991.

4. Defendant, Liberty National Life Insurance Company, is a foreign corporation licensed to do business in the State of Florida.

5. Defendant is subject to the Age Discrimination in Employment Act and was subject to the Act at all times since its enactment into law.

6. Defendant has been aware of the Age Discrimination in Employment Act for over 20 years and has

been aware that the Act prohibits discrimination against employees based on age.

7. At the time that defendant terminated plaintiff, he was 52 years of age and thus was entitled to the protections of the Age Discrimination in Employment Act.

(G) *Agreed issues of law.*

1. This court has jurisdiction over the parties and the subject matter of this dispute.

2. Plaintiff has fulfilled all of the conditions precedent to the institution of this action.

3. If plaintiff prevails, his remedies may include back pay, reinstatement or front pay, the value of perks, benefits, including increased retirement benefits, interest—including pre-judgment interest, attorneys' fees and costs.

4. If plaintiff proves that defendant willfully violated the Age Discrimination in Employment Act, he shall be entitled to liquidated damages. Top rove a willful violation of the Act, plaintiff must demonstrate that defendant knew or should have known that the Age Discrimination in Employment Act prohibited the actions alleged to have been taken against the plaintiff by the defendant, yet undertook such actions in reckless disregard of plaintiff's rights.

5. To the extent the law provides or permits, the prevailing party may be entitled to an award of reasonable attorney's fees and costs.

6. The Federal Rules of Civil Procedure and the Federal Rules of Evidence apply to this action.

(H) *Facts to be litigated.*

1. Whether or not defendant's actions and/or omissions violated plaintiff's rights under the Age Discrimination in Employment Act, and if so, whether such violation was willful.

2. Whether plaintiff sustained damages and the nature and extent of such damages.

(I) *Disputed issues of law.*

1. Plaintiff is unaware of any issues of law which remain for determination by the court.

(J) *Applicable rules of evidence and procedure.*

As noted in Section (G) above, the parties agree that the Federal Rules of Civil Procedure and the Federal Rules of Evidence apply to this action.

(K) *Outstanding motions.*

There are no outstanding motions which require action by the court.

(L) *Statement regarding jury trial.*

This action should be tried before a jury.

(M) *Mediation.*

Plaintiff's new counsel believes that mediation is an extremely valuable method of resolving disputes. He was not counsel when the court entered its order requiring mediation in March of 1995. Nor had he entered his appearance in May, when the court granted a 30-day stay with respect to its previous mediation order. As plaintiff's counsel understands it, the parties have never abided by the court's order referring this matter to mediation. Plaintiff's counsel recommends that Charles L. Cetti be selected as a mediator and that mediation be

required within 90 days. Ordinarily, plaintiff's counsel would seek an earlier mediation. However, his time is currently consumed in preparing for a complex case to be tried in Walton County before Judge Jere Tolton. The case, which involves claims of malpractice on the part of an architect and counterclaims for rights and freedoms protected by the Fourteenth Amendment and 42 U.S.C. §1983 involves hundreds of witnesses and nearly 1,000 documents. It is scheduled to begin on October 30, 1995, and is expected to take up the entire month of November.

Defendant's counsel and plaintiff's prior counsel moved the court for an order staying mediation based upon the parties' unwillingness to enter into any settlement. Defendant's counsel believes that mediation would be fruitless and that the parties will be unable to resolve this matter without a trial.

(N) *Length of trial.*

Both counsel believe that trial of this matter will consume three to five days.

Respectfully submitted this 18 day of October, 1995.

/s/ John Barry Kelly II
John Barry Kelly II
Florida Bar No. 140543
Ray, Kievit & Kelly
15 West Main Street
(32501)
P.O. Box 13490
Pensacola, FL 32591-3490
904/434-3527
Attorney for plaintiff

/s/ David C. Ashburn, by JBH
DAVID C. ASHBURN
Florida Bar No. 708046
Greenberg, Traurig,
Hoffman, Lipoff,
Rosen & Quentel, P.A.
101 E. College Avenue
P.O. Drawer 1838
Tallahassee, FL 32302
904/222-6891
Attorney for defendant

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MCA 94-50124/RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

DEFENDANT'S TRIAL BRIEF

In accordance with this Court's Order of October 26, 1995, Defendant submits this Trial Brief setting forth the key facts and applicable law demonstrating that Defendant has not violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 621 et seq.

I. *Facts Demonstrating That Defendant Has Not Violated the ADEA in Discharging Plaintiff*

1. Defendant terminated Plaintiff's employment as insurance agent on May 9, 1991. Plaintiff's employment was terminated due to his unsatisfactory performance which included sales of insurance policies which resulted in Defendant being required to pay an excessive amount in claims as compared to premiums earned with respect to insurance policies sold by Plaintiff.

2. Plaintiff's performance as an insurance agent demonstrated that he was not qualified for the position from which he was terminated.

3. The reason for Plaintiff's termination is demonstrated, in part, by the losses sustained by Defendant on policies sold by Plaintiff during 1990. As of April 13, 1991, for health insurance policies sold by Plaintiff during 1990, Defendant was required to pay claims in excess of 2½ times the amount of premiums earned. Those excessive losses suffered by Defendant continued a trend of excessive losses established with respect to policies sold by Plaintiff during calendar years 1988 and 1989.

4. As of April 13, 1991, for health insurance policies sold by Plaintiff during 1988, Defendant was required to pay claims in excess of 2 times the amount of premiums earned.

5. In his Complaint, Plaintiff concedes that Defendant evaluated his performance as an insurance agent on the basis of a comparison of premiums earned versus claims paid.

6. Among the individuals who ultimately replaced Plaintiff was at least one individual who was older than Plaintiff.

7. Prior to and subsequent to the termination of Plaintiff's employment, Defendant has hired and continued to employ persons as insurance agents who are approximately Plaintiff's age and older.

8. Even if Plaintiff were able to establish a prima facia case for a violation of the ADEA, Plaintiff's unsatisfactory job performance and the losses Defendant suffered as a result of that unsatisfactory performance constituted legitimate non-discriminatory reasons for Defendant's termination of Plaintiff's employment.

9. Defendant's reasons for its termination of Plaintiff's employment were not a pretext for age discrimination.

II. *Law Applicable to Defendant's Claims*

10. Plaintiff's claim in this case is based solely upon an alleged violation of the ADEA.

11. To establish a prima facia case which would permit recovery under the ADEA, Plaintiff is required to prove:

> (1) That he is a member of the protected group;
>
> (2) That adverse employment action was taken against him;
>
> (3) That he was replaced by a person outside the protected group; and
>
> (4) That he was qualified for the position for which he was rejected.

Bell v. Desoto Memorial Hospital, Inc., 842 Fd.Supp 494, 497 (M.D. Fla. 1994) (citations omitted).

12. As demonstrated above, Plaintiff cannot establish the third and fourth elements of a prima facia case as established in the *Bell* decision.

13. Even if Plaintiff were able to establish a prima facia case of age discrimination, his claim in this case must fail since Defendant's termination of Plaintiff's employment was based upon legitimate, non-discriminatory reasons.

14. As noted by the *Bell* court,

> Once a legitimate, non-discriminatory reason for dismissal is put forward by the employer, the burden returns to the Plaintiff to prove by significantly

probative evidence that the proffered reason is a pretext for discrimination.

Id. at p. 498 (citations omitted).

15. Since Defendant's reasons for its discharge of Plaintiff were pretextual, Plaintiff's claim must fail.

16. Should Defendant be found to have violated the ADEA in discharging Plaintiff, Plaintiff's recovery must be limited to lost wages and benefits. See, *Maleszewski v. United States*, 827 F.Supp. 1553, 1556 (N.D. Fla. 1993). Moreover, any award of equitable relief (e.g., front page) should be determined by the Court rather than the jury.

17. Plaintiff's entitlement to liquidated damages is dependent upon proof that Defendant willfully violated the ADEA in discharging Plaintiff. Such a willful violation may be found only where it is determined that Defendant discharged Plaintiff when it "knew or showed reckless disregard for the matter of whether its conduct was published by the ADEA". *Castle v. Sangamo Weston, Inc.*, 837 F.2d 550 (11th Cir. 1988).

Respectfully submitted this 2nd day of November, 1995.

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

/s/ David C. Ashburn
DAVID C. ASHBURN
Fla. Bar No. 708046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail John Barry Kelly, Esq., Ray, Kievit & Kelly, 15 W. Main Street, P.O. Box 13490, Pensacola, FL 32591-3490 this 2nd day of November, 1995.

/s/ David C. Ashburn
DAVID C. ASHBURN

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case No. 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

SPECIAL VERDICT

WE, THE JURY, in the above-captioned cause, find the following Special Verdict:

1. Do you find, by a preponderance of the evidence, that age was a determining factor in the Defendant's decision to terminate Plaintiff?

Answer "Yes" or "No".

YES: _____ NO: _____

(If you have answered "Yes", then answer Question No. 2. If you have answered "No", then do not answer any of the other questions, and have your Foreman sign and date this form.)

2. What amount of back pay and compensatory damages do you find that the Plaintiff is entitled to receive?

Amount: $ _____

(Proceed to Question No. 3.)

3. In terminating the Plaintiff, do you find that the Defendant "willfully" violated the Age Discrimination in Employment Act, as the term "willful" was defined for you in the Court's instructions?

Answer "Yes" or "No".

YES: _____ NO: _____

(If you answer "Yes", the Court will double the amount of damages you found in Question No. 2.)

SO SAY WE ALL.

DATED this _____ day of March, 1996.

_____

Foreman

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Civil No.: 94-50124-RV

SAMUEL L. DAY,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

EXCERPTS FROM TRANSCRIPT OF
THIRD DAY OF TRIAL
BEFORE THE HONORABLE ROGER VINSON
UNITED STATES DISTRICT JUDGE, and a jury.

Panama City, Florida
March 27, 1996
8:45 A.M.

* * *

[64] Subject to that, anything else to come before the Court from either side?

MR. KELLY: Nothing for the plaintiff, Your Honor.

MR. ASHBURN: Yes, Your Honor. It's a legal matter that I don't know if we need to take up in front of you or not, based on the verdict that was rendered,

Your Honor, based on the answer to Question 3, and the timing of the bringing of this action.

THE COURT: I'm not sure I understand what you mean.

MR. ASHBURN: Your Honor, as a matter of law, the this action was not brought within two years; and, therefore, under the statute, for the defendant (sic) to recover any amount of monies, he had to prove that the discrimination was willful. The jury has rendered a verdict that the [65] discrimination was not willful.

THE COURT: We'll take that up, then. I'm not sure that I understand your ramifications of what you are telling me, but we'll take that up in just a moment. I'll let the jury go home.

All right, ladies and gentlemen, we are going to excuse you, and you're free to go. If you need something for your employer to prove that you've been on federal jury duty, if you've asked for it, I think we have those ready and waiting for you.

So, we'll excuse the jury, and we'll be in recess for about ten minutes. We'll come back in and take up this matter.

(A recess was taken from 1:58 p.m. to 2:04 p.m.)

(Parties present.)

THE COURT: Take seats. We have the parties and lawyers here. Mr. Ashburn, tell me what the problem is.

MR. ASHBURN: Yes, Your Honor. Under the statute that the plaintiff has brought his claim, it provides that, if he had filed his action within a certain two-year time frame, then he would be entitled to recover on the findings as we find them in the first two questions. It also provides, however, that, if the claim was not brought within those two years, but it was brought within a three-year period, which this one made it in within

a matter of days—[66] it was made within the three-year period—that he can only recover if there's a finding that the discrimination is willful.

The jury specifically found on their third item that this was not a willful discrimination; therefore, under that statute, we don't believe he can recover anything.

THE COURT: All right. Mr. Kelly?

MR. KELLY: I don't think that is accurate; but, at this stage, I'm not prepared to argue to the Court.

THE COURT: All right. Well, I'm going to let you both submit a memorandum on it, and you can do it simultaneously. I'll give you—let's do it quickly. I'll give you a week from today. So, that ought to be enough time. It ought to be a pretty simple issue, whatever it is. I haven't even realized, I guess, that there was a distinction between the two-year and three-year statute of limitation.

MR. KELLY: There is in terms of damages, Your Honor, that I'm aware of, but not in terms of filing. But, at any rate, we'll find out.

THE COURT: Well, brief it for me, and then I'll make a decision on the matter; and we'll see what else, if anything, we might do.

* * *